United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

ORIGINAL

B
P/S

75-1045

IN THE

United States Court of Appeals

For the Second Circuit

75-1045

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

against

VICTOR PANICA,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF AND APPENDIX ON BEHALF OF APPELLANT

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STANLEY M. MEYER
of Counsel

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TABLE OF AUTHORITIES

UNITED STATES COURT OF APPEALS
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UNITED STATES OF AMERICA,

Appellee,

-against-

Docket No.
75-1045

VICTOR PANICA,

Defendant-Appellant.

- X

BRIEF ON BEHALF OF APPELLANT

PRELIMINARY STATEMENT

This is an appeal from a decision and order of the United States District Court for the Southern District of New York, (Gagliardi, J.), rendered November 25, 1974, which denied without a hearing, in a three page memorandum, appellant's application for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure, and his petition for a writ of habeas corpus, pursuant to 18 U.S.C., Section 2255.

Appellant was initially convicted of two counts of Conspiracy to Distribute Narcotic Drugs in violation of 21 U.S.C., Sections 812, 841(a)(1) and 841(b)(1)(A), on June 20, 1972. He was found guilty by a jury and was sentenced to concurrent twenty year terms of imprisonment on each count. The United States Court of Appeals for the Second Circuit affirmed the conviction, along with that of the two co-defendants, NICHOLAS CHRISTOPHE and ALBERT PIERRO, on December, 1972, in a fifteen

page opinion (United States v. Christophe, 470 F.2d 865). The Supreme Court denied certiorari on May 7, 1973 (411 U.S. 964). Appellant has been incarcerated during all of the appellate proceedings.

FACTS

After a pre-trial suppression hearing, two co-defendants, PIERRO and CHRISTOPHE, pleaded guilty. Appellant proceeded to trial, along with another co-defendant, FRANK DeSIMONE, who secured a directed verdict of acquittal. This case essentially involved a situation where appellant was a passenger in a car driven by CHRISTOPHE, a car which when stopped was found to have in its trunk 39.8 pounds of heroin and $150,000.00 in cash. The car had been stopped after a chase and the only real evidence against appellant was that when the car was stopped, PANICA started to run away, certainly not very much to base a conviction, let alone a twenty year sentence, on. In fact, the opinion of the Court of Appeals, United States v. Christophe, supra, at 869, clearly summarized the totality of the evidence against PANICA:

> "After transferring the heroin from Pierro's house to(the trunk of) Christophe's car, Christophe drove directly to the Plaza Diner where he met Panica and DeSimone. Following a short discussion (not overheard by the agents), Panica got into the Cadillac containing the heroin and the $150,000 and drove off with Christophe. When the car halted after a high spped chase by federal agents, Panica fled on foot. When he was confronted immediately thereafter by agent Harrington in the bar, Panica made the false exculpatory statement that he had been there for an hour and a half, which covered the time from which the narcotics were first placed in the car through the period of the police chase."

This was a case where appellant was a passenger, not the driver of a car being used to transport heroin; where appellant did not load

the car; where the trunk of the car containing the anrcotics and money was never opened in appellant's presence. Although the co-conspirators had been under surveillance for over a month, there was no evidence of any prior association between appellant and the other alleged co-conspirators. No conversation between them was offered in evidence. No hearsay declarations of co-conspirators were offered into evidence, as there was in United States v. Geaney, 417 F.2d 1116 (2nd Cir. 1969), the only authority cited by the Court of Appeals in this case in support of its decision. The only act appellant performed was to run away from the car and to attempt to falsely dissociate himself from the car and its driver.

On the basis of this evidence, the Court concluded at 870:

> "Taken together these facts provided enough evidence from which a jury could find that (appellant) knew what was going on and that by his presence he was attempting to assist the success of the operation and, therefore, that he was a member of the conspiracy. Cf. U.S. v. Geaney, 417 F.2d 1116,1121 (2nd Cir. 1969) cert. den. 397 U.S. 1028 (1970)."

Thereafter, after appellant was incarcerated at the Federal Detention Center on West Street, a federal employee there informed appellant that he had been told by NICHOLAS CHRISTOPHE, the driver of the car, while he was a prisoner at the detention center, that appellant had nothing to do with the crime, that he could have testified and exonerated appellant, but he was specifically pressured into not doing so by the Assistant United States Attorney who tried the case upon the threat he would be prosecuted for certain bank robberies.

A private investigator was hired and he and an associate interviewed the federal employee, a man who still was an employee at the Detention Center. A three page statement was obtained (A 14 - 16)* and with references to names and identity factors blocked out, the statement was annexed to appellant's petition for a writ and motion for a new trial.

In one government affidavit in opposition to the application, MR. VIVIANI pointed out that a pre-trial severance motion had been made by appellant's counsel on the grounds that he intended to call CHRISTOPHE as a witness (A 18). Thus, if CHRISTOPHE was prevented from testifying by the government, it was interference with a course of conduct appellant's lawyer had already intended.

Appellant also submitted an affidavit of ALBERT PIERRO, the other convicted defendant that CHRISTOPHE told him he would exonerate appellant (A 33 - 34), and that he would do anything the prosecutor wanted because he was promised he could visit his ailing daughter.

The Court below denied the applications without a hearing solely on its decision to accept the naked denial of pressure applied to CHRISTOPHE averred to in a short affidavit submitted by the Assistant United States Attorney who tried the case (A 28 - 29). This lone affidavit apparently was the basis of the Court's concluding that the "files and records 'of the case conclusively show that a prisoner is entitled to no relief'" (A 37).

*References are to pages of the appendix.

It is appllant's contention that the applicable principles of law have been entirely misapplied under the circumstances of this case.

STATUTE

Section 2255 — Federal custody; remedies on motions attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States Attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy

by motion is inadequate or ineffective to test the legality of his detention.

POINT I

THE COURT BELOW SHOULD HAVE ORDERED A HEARING. THIS IS NOT A SITUATION WHERE THE FILES AND RECORDS OF THE CASE CONCLUSIVELY SHOW THAT THE APPELLANT IS NOT ENTITLED TO RELIEF.

This case is quite different from the usual 2255 situations that most Judges and attorneys have come to be familiar with. No doubt this Court is familiar with many situations wherein federal prisoners attack the integrity of the United States Attorney by virtue of various claims that evidence was suppressed, perjured testimony was knowingly used, or other conduct was engaged in which implied less than basic tradition recognized by the Courts. This case is unusual in that it was based on a statement made by a federal employee at the Federal Detention Headquarters in West Street, who was still an employee at the time the writ was brought and at last look continues in his job. This employee specifically alleged that a co-defendant, NICHOLAS CHRISTOPHE, told him when he was incarcerated at West Street that the Assistant United States Attorney prevented him from taking the witness stand and exonerating the appellant. It cannot be disputed that such evidence is much more significant than the normal protestations of a disgruntled prisoner that he has been the victim of some nefarious government plot. The integrity of the United States Attorney was thus specifically impuned and the evidence which seems to exist is based upon a good deal more than a prisoner's naked assertion.

The Court below denied this motion for a new trial and for a writ of habeas corpus without a hearing on the grounds that the "...files and records 'of the case conclusively show that a prisoner is entitled to no relief'" This was the decision even though the Court recognized that normally a hearing should be held upon a motion made pursuant to Section 2255. It is respectfully submitted that the three cases cited by the Court below do not support the decision to deny a hearing, and that the statute intended hearings to be denied when the files and records of the case which were already existant conclusively showed that there was no basis for relief, rather than an affidavit of the prosecutor in opposition.

In other words, it is generally the law that where a Judge may decide that there is no meritorious issue raised by a petitioner for a writ of habeas corpus by merely looking at the contents of the file, he can deny the application without a hearing. This does not mean that a Court can merely take an affidavit in opposition submitted by the Assistant United States Attorney and decide to give that credibility rather than the evidence presented in support of the petition for relief. This is exactly what the Court did in this case. It ignored the evidence submitted by the appellant by virtue of the affidavit of counsel, the statement of the federal employee and an affidavit of a co-defendant, ALBERT PIERRO. The Court decided to accept and believe the affidavit of the Assistant United States Attorney, which merely stated that he had not been guilty of any wrongdoing. To resolve a critical dispute of fact in this manner is clearly improper.

Appellant's position is supported by this Court's opinion in Taylor v. United States, 487 F.2d 307 (2nd Cir. 1974), upon which the Trial Court relied, but apparently misconstrued. That case held specifically that "...an opposing affidavit by the government is not part of 'the files and records of the case' which can be taken to 'conclusively show that the prisoner is entitled to no relief'..." This Court pointed out that that principle was established by the Supreme Court in Walker v. Johnson, 312 U.S. 275 (1941), and that it was apparently beyond question. Taylor was then granted the evidentiary hearing which the Court held should have been afforded him at least a year before. That opinion generally established that a Judge has no right to choose to accept one affidavit on its face when it is clearly contradicted by other affidavits or evidence. It is suggested that a hearing or writ in this case should have been granted since there is a clear possibility that wrongdoing may have been committed. The other cases that have been decided by this Court, some of which have been relied on by the Court below, also support appellant's contention. Thus, in United States v. Pisciotta, 199 F.2d 603 (2nd Cir. 1952), it was established that mere conclusionary allegations of a conversation that he was innocent of a charge to which he pleaded would not be enough to entitle him to a hearing or a retrial. It is submitted that the case at bar presents quite a different position, since the affidavit of the co-defendant, the statement of the federal employee and other evidence which may come to light, take this case far beyond the status of containing only naked conclusions. This idea is also to be found in Dalli v. United States,

491 F.2d 758 (2nd Cir. 1974) and D'Ercole v. United States, 361 F.2d 211 (2nd Cir. 1966). These cases taken together stand for the proposition that a plain hearsay statement or protestation of innocence is not normally enough to obtain a hearing. Dalli also specifically states that great specificity is required where the issues alleged are issues which have already been passed upon at a prior stage of the proceedings. Dalli involved an issue with respect to wiretaps when a full evidentiary hearing prior to the actual trial had already been held.

The case at bar involves an issue which has never been litigated and which came to light for the first time after this case had been concluded. One needs only to look at the affidavit of counsel for the appellant, MARVIN PREMINGER, to see exactly how this situation came to light. When the appellant reported that he had been told by the federal employee what CHRISTOPHE had said, private investigators were hired and the statement was obtained (A 14-16). It is also submitted that this issue is not merely an after-thought or some type of theory to base this writ on, but that because the appellant's attorney moved for a severance at the trial on the basis of his contention that he would be calling CHRISTOPHE as a witness, it is entirely believable that CHRISTOPHE had promissed appellant, as he says was the case, that when the time came, he would exonerate him. It should be noted that since CHRISTOPHE was incarcerated, his sentence was reduced significantly, to which point where he is now at liberty. This reduction was apparently based on a Rule 35 motion, which has been kept secret. He has apparently given the government information and

aided the government in some substantial way. If the Court, therefore, placed some reliance on his word, it should also be prepared to place reliance on a statement that he may have made to a federal employee that the appellant was innocent.

The fact that appellant may be innocent is entirely believable since, as we have already alluded to in the facts, this case was extremely weak against appellant, PANICA. He was a passenger in the car, and the only real evidence against him was the fact that he attempted to flee when the arrests were made. I am sure this Court fully realizes that men sometimes do things in the heat of a situation for other reasons than reasons of guilt. To again summarize this Court's opinion of the evidence against PANICA, United States v. Christophe, supra at 869:

> "After transferring the heroin from Pierro's house to (the trunk of) Christophe's car, Christophe drove directly to the Plaza Diner where he met Panica and DeSimone. Following a short discussion (not overheard by the agents), Panica got into the Cadillac containing the heroin and the $150,000.00 and drove off with Christophe. When the car halted after a high speed chase by federal agents, Panica fled on foot. When he was confronted immediately thereafter by agent Harrington in the bar, Panica made the false exculpatory statement that he had been there for an hour and a half, which covered the time from which the narcotics were first placed in the car through the period of the police chase."

The Court below also mentioned in its opinion that the statement of the federal employee did not specifically refer to what CHRISTOPHE would have testified to and that it is deficient for that reason. It is respectfully submitted that that reasoning should not have prevented a hearing because the employee merely related what

CHRISTOPHE had told him. At the time he spoke to CHRISTOPHE he was not anticipating any type of court proceeding, nor was he intending to come forward and relate what he had heard. His statement indicates that it was only after much soul searching that he decided to even get himself involved. For this he should be commended, and it seems to appellant that to decide that he did not ask CHRISTOPHE certain technical questions, such as what he would have actually said on the witness stand, is to honor form over substance. The fact of the matter is that a serious issue was raised. It cannot be ignored by mere technicalities, and it would seem that a full hearing was warranted. The federal employee was not an attorney, and was no doubt not fully aware of some obscure rule against hearsay or conclusionary allegations. It should have been enough that a substantial issue was created. The fact is that if the allegation contained in the moving papers was true, to wit: that an Assistant United States Attorney suppressed evidence, it may have exonerated this appellant and certainly he should be entitled to relief if he could support that allegation. Even in the Dalli case, where a full hearing had already been had into the wire-tap issue, still it was recognized that a new hearing might be proper.

It is clear that generally speaking when issues of fact are created which if true would seriously effect the judicial or fact finding process, hearings should be granted. In the case at bar, the evidence against the appellant was not overwhelming, but was rather sparse. He received a twenty year sentence, and it is respectfully submitted that the very least the judicial system could have given him was a full hearing.

There have been many examples of improper conduct by government representatives and informers which have created a situation whereby Courts are not as quick to accept mere statements from representatives of government as they may have been in the past. The Court below in this case denied this application on the affidavit of an Assistant United States Attorney that he did not suppress evidence. Obviously, one would not expect someone who was guilty of the conduct alleged to admit it. For that reason alone, the Court's apparent reliance on this statement seems to be ill founded.

CONCLUSION

THE ORDER OF THE DISTRICT COURT SHOULD BE REVERSED AND THE CASE SHOULD BE REMANDED FOR A FULL EVIDENTIARY HEARING.

Respectfully submitted,

PREMINGER, MEYER & LIGHT
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66 Court Street
Brooklyn, New York 11201

STANLEY M. MEYER
Of Counsel

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CRIMINAL DOCKET
UNITED STATES DISTRICT COURT JUDGE GAGLIARDI

C. Form No. 100 Rev.

72 CRIM. 313

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	For U. S.:
vs.	
NICHOLAS CHRISTOPHE	Walter J. Higgins, Jr. 6346
FRANK DeSIMONE	
VICTOR PANICA	
ALBERT PIERRO	For Defendant:

STATISTICAL RECORD	COSTS			DATE	NAME OR RECEIPT NO.	REC.	DISB.
. 2 mailed ✓	Clerk			6/21/72	P Greenberg	5 —	
				6/23/72	US Treas.		5 —
. 3 mailed 2/1/72	Marshal			6/21/72	J Goldberg	5 —	
				6/23/72	US Treas.		5 —
XXXXComp. #72-0335	Docket fee			6/28/72	J M LaRosa	5 —	
				6/30/72	US Treas.		5 —
le 21							
. 812, 841(a)(1) 841(b)(1)(A) 46. Possess with intent istribute heroin, I 2) conspiracy so to t. 1) two counts							

DATE	PROCEEDINGS
-17-72	Filed Indictment.
21-72	Nicholas Christophe) All defts enter pleas of not guilty. Frank De Simone) Bail as set in indictment 72 Cr. 138 Victor Panica) on each deft. to cover this indictment. Albert Pierro) previous motion carried tonthis end. Trial date 4-21-72 Gagliardi, J.
1-72	Victor Panica Filed- Second information of offender.
-72	Albert Pierro Filed- Second information of offender.
XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX	
-72	All defts. Suppression haering begun.
-72	Hearing continued.

ONLY COPY AVAILABLE

72 CR 31

DATE	PROCEEDINGS
26-72	Deft. Christophe- signed and executed waiver of trial by jury this date. Stip. on facts to be submitted. Sentence decesion reserved. Deft. remanded (no bail)
	Deft. Pierro- withdraws his plea of not guilty and pleads guilty. Deft's application to be remanded. Granted. Pre-sentence investigation ordere Sentance adjourned to 5-26-72 at 10:00 A.M.
	Jury trial begun before Gagliardi, J. as to defts. DE SIMONE and PANICA.
4-21-72	N. Christohpe-Hearing on motion to supress began
4-24-72	Christophe- Hearing continued.
4-25-72	Christophe-Hearing continued and concluded. -Decision reserved.
4-26-72	Christophe-Filed waiver of trial by Jury.
4-26-72	Jury trial begun before Gagliardi,J. as to defts. DE SIMONE and PANICA.
4-27-72	Trial continued.
4-28-72	Trial continued. Deft. De simone motion for acquittal- Granted. Deft's bail to be exonarated in this indictment only, after deft. posts new bail fixed by the Magistrate. Deft. excused by the court. Trial continued as to deft. Panica only.
5-1-72	Trial continued.
5-1-72	Trial continued-Jury starts deliberations. As to deft. Panica only
5-2-72	Jury trial-Continued and concluded-Jury finds deft guilty on cts 1 & 2. P. S. I. ordered.-Deft. remanded in lieu of bail fixed on indict. 72 Cr. 138.-Sentence 6-19-72 at 9:30 A.M. Gagliardi, J. as to deft. Panica only
-12-72	VICTOR PANICA Filed memorandum-application for reduction of bail pending appe sentence is denied. Bail is cont'd as previously set in the amt. of $400,000. GAGLIARDI,J. m/n
5-17-72	Albert Pierro-Motion to withdraw plea of not guilty-Decision reserved. Gagliardi, J.
[illegible]	[illegible]
5-23-72	Albert Pierro Filed- Affvt. of Walter J. Higgins, Jr. in opposition to t deft. mmotion for an order permitting the withdrawal of h plea of guilty to both cts.
23-72	Pierro Filed-Memorandum of law.

(Over)

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DATE	PROCEEDINGS
5-72	Albert Pierro- Deft's motion to withdraw plea of guilty-Granted. Waiver of trial by jury approved and filed. Non-jury trial begun before Gagliardi,J. and concluded. Court finds defendants Pierro and Christophe guilty on counts 1 and 2. Both defendants remanded. Bail revoked. Sentence adjourned to 6-19-72. Pre-sentence report ordered. Gagliardi,J.
5-25-72	Albert Pierro Filed- Waiver of trial by jury Gagliardi, J.
-20-72	Victor Panica - Filed notice of record on appeal to U.S.C.A. from the Judgment and conviction Atty fop deft Jay Goldberg.
20-72	~~Filed~~ VICTOR PANICA -Filed Judgment(Atty present)2nd Offender the deft duly represented by counsel, admits that he is the person previously convicted as charged on one separate Federal Narcotic Violation....The deft is committed to the custody of the Atty.Gen.or his authorized representative for imprisonment for a period of TWENTY(20) YEARS on each of counts 1 and 2 to run concurrently with each other. Pursuant to the provisions of Sec. 841 of Ti.21, U.S.Code, deft is placed on Special Parole for a period of SIX(6)YEARS, to commence upon expiration of confinement....Gagliardi,J. Issued commitment and copies...
-20-72	ALBERT PIERRO-Filed Judgment(Atty.present)2nd Offender the deft duly represented by counsel, admits that he is the person previously convicted as charged on one separate Federal Narcotic Violation..The deft is committed to the custody of the Atty.Gen. or his authorized representative for imprisonment for a period of TWENTY(20)YEARS on each of counts 1 and 2 to run concurrently with each other. Pursuant to the provisions of Sec.841 of Ti.21,U.S.C,deft is placed on Special Parole for a period of SIX(6)YEARS, to commence upon expiration of confinement....GAGLIARDI, J.... Issued commitment and copies....
6-20-72	NICHOLAS CHRISTOPHE-Filed Judgment(Atty.present)the deft is committed to the custody of the Atty.Gen. for imprisonment for a period of SEVEN and ONE HALF(7½)YEARS on each of cts.1 and 2 to run concurrently with each other. Pursuant to the provisions of Sec.841 of Ti. 21, U.S.Code, deft is placed on Special Parole for a period of THREE(3)YEARS, to commence upon expiration of confinement..GAGLIARDI,J.... Issued commitment and copies...
6-21-72	Filed notice of [redacted] appeal to U.S.C.A. dated 6-20-72. re: Albert Pierro
6-30-72	Christophe-filed affirmation and motion for deft. to appeal in forma pauperis and for appointment of counsel
7-7-72	Memo. endorsed on back Motion granted. So ordered Gagliardi, J. (mailed notice)(see file)
6-21-72	Panica-Notice of appeal to U.S.C.A. - fee paid mailed notice.
6-28-72	Pierro-Filed notice of appeal to USCA-mailed notice.
7-23-72	Filed Transcript of record of proceedings, dated 4-26-72.
7-11-72	Filed Transcript of record of proceedings, dated 4-26-72
7-11-72	Filed Transcript of record of proceedings, dated 4-21, 24, 25, 1972
7-11-72	Filed Transcript of record of proceedings, dated May 1, 2, 1972
6-28-72	CHRISTOPHE- Filed deft's notice of appeal. mailed copy.

DATE	PROCEEDINGS
7-12-72	Victor Panica-filed affvt. and order that this Court recommends to the Gen. of the U.S. that the deft be retained at the Fed. Det. Hdqrts. 427 West. St. N.Y. Gagliardi, J.
7-24-72	Pierro-Filed Commitment & entered return, Deft Delivered to the Fed. Detention Hdqrts N.Y. 6-20-72
7-24-72	Christophe-Filed Commitment & entered return, Deft Delivered to the Fed. Detention Hdqrts N.Y. 6-20-72
8-8-72	PANICA - Filed notice that proceedings has been transmitted to U.S.C.A. on 8-8-72
8-17-72	Panica- Filed Order by Judge Bauman, dated 8-17-72, pursuant to Rule 38(of the FRCP, that this Court recommends to the Atty. Gen. of th U.S. that the defendant be retained at the Federal Detention Headquarters, 427 West St. New York, N.Y., for a period of seve days to permit the saiddefendant to assist in the preparation o his appeal to the said Court of Appeals.(see file) (m/n)
8-28-72	Pierro-Panica-Filed Transcript of record of proceedings, dated 4-27-72
	Filed Transcript of record of proceedings, dated 4-28-72
	Filed Transcript of record of proceedings, dated 5-2-72
11-17-72	Panica-Filed notice that the supplemental record on appeal has been certified and transmitted to the U.S.C.A.
5-12-72	Pierro, Filed affdvt. and defts notice of motion for an order permitting deft withraw his plea of guilty.
12-13-72.	Filed Govt's memorandum of law in opposition to defendants' motions to suppress, etc.
2-26-73	Nicholas Christophe, Victor Panica and Albert Pierro- Filed Mandate from USCA with Opinion attached, that the judgments of the District Court are affirmed. Judgment entered 2-26-73 - Clerk. (m/n)
5-17-73	Pierro-Filed true copy of Judgment of the Supreme Court of the U.S. for petition of writ of certiorari, petition denied.
5-17-73	Panica- Filed true copy of Judgment of the Supreme Court of the U.S. for petition of writ of certiorari, petition denied.
5-31-73	Nicholas Christophe Filed affidavit and notice of motion pursuant to Rule 35, for reduction of sentence..
7-23-73	VICTOR PANICA. Filed Commitment & entered return, Defl. Delivered to the Detention Hdqtrs NY

DATE	PROCEEDINGS
28-73	ALBERT PIERRO: Filed NOTICE OF MOTION and supporting AFFIDAVIT and letters for a reduction of sentence and such other relief the Court may deem just and proper. Received from: James M. LaRossa, attorney for the defendant [522 Fifth Avenue, New York, N.Y. 10036].
5-73	Victor Panica-Filed defts notice of motion foran order reducing the sentence with memo endorsed attached, ***Accordingly, the motion is denied. (see memo in file) So Ordered Gagliardi,J.
26-73	ALBERTO PIERRO: Filed MEMORANDUM by Judge Gagliardi on motion for reduction of sentence from the defendant. Having reconsidered all information relevant to sentencing, the Court concludes that the original sentence is correct. Motion denied. GAGLIARDI, J.
-20-73	NICHOLAS CHRISTOPHE: Filed AMENDED JUDGMENT. Court amends its judgment of June 20, 1972 to the extent indicated. The defendant is committed to the custody of the Attorney General, or his authorized representative, for a period of imprisonment of FOUR (4) YEARS on each of counts 1 and 2, to run concurrently with each other. Pursuant to the provisions of Section 841 of Title 21, U.S. Code, the defendant is placed on Special Parole for a period of THREE (3) YEARS, to commence upon expiration of confinement. The Court recommends that the defendant shall become eligible for parole at such time as the Board of Parole may determine, pursuant to Section 4208(a)(2) of Title 18, U.S. Code. GAGLIARDI, J.
5/74	Filed deft V. Panica- filed notice of motion re: new trial.
/74	Filed Govt's affdvt re; opposition to deft's motions for a new trial,etc.
/74	Filed Govt's memo of law in support of affdvt in opposition.
15/74	Filed deft. Pierro's notice of motion and affdvt. re: return of property, amend sentence, ret: 10/22/74.
/25/74	Filed OPINION # 41485-...The motion for a new trial is equally lacking in support, being based upon the same affdvts. For the reasons stated, Panica's motions are denied. Gagliardi,J. mailed notices.
9/74	Filed OPINION #41545-...deft. Albert Pierro's motion for reduction of sentence is denied. Gagliardi, J. mn
18/74	Filed Govt.'s affdvt. in response to defts. motion for return of property,etc.
19/74	Filed copy of judgment (for deft. N. Christophe) and marshal's return, served by air-mailing 3 copies of this amended judgment to the U.S. Marshal at Providence, Rhode Island.
20/74	Filed deft. Victor Panica's notice of motion re: search for papers,etc.

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20-73	NICHOLAS CHRISTOPHE: Filed AMENDED JUDGMENT. Court amends its judgment of June 20, 1972 to the extent indicated. The defendant is committed to the custody of the Attorney General, or his authorized representative, for a period of imprisonment of FOUR (4) YEARS on each of counts 1 and 2, to run concurrently with each other. Pursuant to the provisions of Section 841 of Title 21, U.S. Code, the defendant is placed on Special Parole for a period of THREE (3) YEARS, to commence upon expiration of confinement. The Court recommends that the defendant shall become eligible for parole at such time as the Board of Parole may determine, pursuant to Section 4208(a)(2) of Title 18, U.S. Code. GAGLIARDI, J.
25/74	Filed deft V. Panicsa- filed notice of motion re: new trial.
2/74	Filed Govt's affdvt re; opposition to daft's motions for a new trial,etc.
2/74	Filed Govt's memo of law in support of affdvt in opposition.
/15/74	Filed deft. Pierro's notice of motion and affdvt. re: return of property, amend sentence, ret: 10/22/74.
1/25/74	Filed OPINION # 41485-...The motion for a new trial is equally lacking in support, being based upon the same affdvts. For the reasons stated, Panica's motions are denied. Gagliardi,J. mailed notices.
2/9/74	Filed OPINION #41545-...deft. Albert Pierro's motion for reduction of sentence is denied. Gagliardi, J. mn
2/13/74	Filed Govt.'s affdvt. in response to defts. motion for return of property,etc.
2/19/74	Filed copy of judgment (for deft. N. Christophe) and marshal's return, served by air-mailing 3 copies of this amended judgment to the U.S. Marshal at Providence, Rhode Island.
2/20/74	Filed deft. Victor Panica's notice of motion re: search for papers,etc.
/19/74	N. Christophe - Filed commitment Return Dft delivered to ( ) Delivered on 12/9/74 on mandatory release

DATE	PROCEEDINGS
21/75	Filed deft. Victor Panica's notice of appeal from order of 11/25/74 denying motion for new trial. Mailed notices.
10/75	Filed Reply Affidavit of defendant, dated May 7-74, in reply to the answering Affidavits of the U.S. Govt.

A TRUE COPY
RAYMOND F. BURGHARDT
By
Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

UNITED STATES OF AMERICA,

-against-

VICTOR PANICA,

Defendant.

- X

NOTICE OF MOTION

Indictment No. 72 CR 313

S I R S :

PLEASE TAKE NOTICE, that upon the annexed affidavit of MARVIN PREMINGER, sworn to the 22nd day of March, 1974, the exhibit annexed thereto, and upon all the prior proceedings had herein, the undersigned will move this Court, before Honorable LEE GAGLIARDI, at the Courthouse, Foley Square, New York, New York, on the day of March, 1974, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order granting the defendant a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure, on the basis of newly discovered evidence, and for an order discharging the defendant from custody pursuant to 28 U.S.C. Section 2255, on the grounds that the conviction obtained herein was obtained in violation of defendant's right to due process of law, was obtained in part by the unlawful suppression of evidence by the prosecution and was in other ways violative of defendant's right to a fair trial, and for such other and further relief as to this Court may seem just and proper.

Dated: Brooklyn, New York
March 22, 1974

Yours, etc.,

MARVIN PREMINGER, ESQ.
Attorney for Defendant
Office & P.O. Address
66 Court Street
Brooklyn, New York 11201
834-8888

TO: HON. PAUL J. CURRAN
United States Attorney
Southern District of New York
United States Courthouse
Foley Square
New York, New York

Clerk of the United States
District Court
Southern District of New York
United States Courthouse
Foley Square
New York, New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- X

UNITED STATES OF AMERICA,

-against-

VICTOR PANICA,

Defendant.

AFFIDAVIT

Indictment No.
72 CR 313

- X

STATE OF NEW YORK)
) SS.:
COUNTY OF KINGS)

MARVIN PREMINGER, being duly sworn, deposes and says:

I am the attorney for the defendant, VICTOR PANCIA, who was convicted, after a jury trial, of Conspiracy to Districute Narcotic Drugs and Possession of Narcotic Drugs, in violation of 21 U.S.C., Sections 812, 841(a)(1) and 841(b)(A). The conviction was rendered on June 14, 1972 and defendant was sentenced to concurrent terms of twenty years in prison on each count.

His conviction was thereafter affimred by the United States Court of Appeals on December 14, 1972, and certiorari was thereafter denied by the Supreme Court.

The case involved a situation where the defendant was a passenger, not the driver,of a car being used to transport heroin, and where the defendant's role was ambiguous at best. He did not load the car, the trunk of the car in which the narcotics were contained was never opened in his presence and although the other co-conspirators had been under surveillance for over a month, there was no evidence of any prior association between them and the defendant and no declarations of the co-conspirators were offered into evidence. The only act that the defendant allegedly committed was to run away

from the car when the arrests were made and to attempt to falsely disassociate himself from the car and its driver.

The Court of Appeals opinion concisely sets forth the evidence adduced against the defendant:

> "After transferring the heroin from Pierro;s house to (the trunk of) Christophe's car, Christophe drove directly to the Plaza Diner where he met Panica (the appellant) and DeSimone. Following a short discussion (not overheard by the agents), Panica got into the Cadillac containing the heroin and the $150,000. and drove off with Christophe. When the car halted after a high speed chase by federal agents, Panica fled on foot. When he was confronted immediately thereafter by Agent Harrington in the bar, Panica made the false exculpatory statement that he had been there for an hour and a half, which covered the time from which the narcotics were first placed in the car through the period of the police chase."

Opin. p. 1052

In addition,the Court said that because of the attempt to run away and falsely disassociate himself with the occupants of the car, that alone could lead a jury to infer that he knew what was going on.

> "Taken together these facts provided enough evidence from which a jury could find that (appellant) knew what was going on and that by his presence he was attempting to assist the success of the operation and, therefore, that he was a member of the conspiracy. Cf. U.S. v. Geaney, 417 F.2d 1116,1121 (2nd Cir. 1969) cert. den. 397 U.S. 1028 (1970)."

Opin., pp. 1052-1053

Sometime ago, during last summer, I was advised that one of the co-defendants, one NICHOLAS CHRISTOPHE, had admitted to a federal employee in the Federal House of Detention at West Street that the defendant, VICTOR PANICA, had nothing to do with the crime, but more important, that he was pressured and threatened by Assistant United States Attorney HIGGINS from coming forward and attesting to that fact on the threat that he would be prosecuted for various bank robberies. We were told that CHRISTOPHE had admitted that the Assistant United States Attorney insisted that he could not take the witness stand and tell the truth to exonerate Mr. PANICA.

We hired a private investigator and he contacted the federal employee, who incidentally is still employed, to the best of our knowledge, at the Federal Detention Headquarters, and obtained a statement from that employee completely corroborating what our client told us.

I have annexed hereto a photostatic copy of that statement. However, I have blocked out portions of that statement on the photostat only so as not to reveal the identity of the employee at this time to prevent possible pressure on him, since improper conduct on the part of an Assistant United States Attorney is alleged. Of course, I will reveal his identity and exhibit the original statement to the Court subject to the Court's directive. In addition, my client has a statement of the co-defendant, ALBERT PIERRO, who is now in jail, which tends to corroborate CHRISTOPHE's statement that PANICA was merely an innocent bystander in the case.

I believe that in view of the serious nature of the allegations, a hearing is warranted, since the conviction against the defendant may have been obtained in violation of his right to a fair trial and partly through the improper efforts of one of the prosecuros. The evidence referred to herein was not known at the time of trial and was obtained only this past summer. This proceeding was not brought on prior to this time due to the fact that we were investigating the matter, pursuing other leads and also because of my own trial schedule.

Our investigation also shows that MR. CHRISTOPHE has become a federal informant. He has been, to the best of our knowledge, aiding the F.B.I. and furnishing them with information. In fact, we have learned that he is separated from his wife because of the fact that he was offered a new identity in some other location and she refused to go along with it. I am led to the inescapable conclusion that MR. CHRISTOPHE was a federal informatant at the time this case was tried, and if that is the case, the defendant's constitutional

rights were further violated, becasue MR. CHRISTOPHE and the defendant, VICTOR PANICA, were represented by the same attorney. Obviously, PANICA did not know of CHRISTOPHE's status at the time of the proceeding. If it develops that this was the fact, that the "spy in the camp" doctrine had been violated, the appellant's right had been diluted not only because of the failure of the Government to provide defendant with exculpatory material according to the Brady case, but because the Supreme Court has disapproved ofthe Government allowing an informant to interject himself into the attorney/client relationship of defendants. Coplon v. United States, 191 F.2d 749 (D.C. Cir.) cert. den. 342 U.S. 926 (1951); Caldwell v. United States, 205 F.2d 879, (D.C. Cir. 1953); Unite States v. Zarzour, 431 F.2d 1 (5th Cir. 1970). If this situation is found to exist, especially according to the Caldwell case, the conviction herein would have to be invalidated.

WHEREFORE, your deponent respectfully requests that a hearing be had and that upon the conclusion of said hearing that the judgment herein be vacated, the defendant be discharged from custody, or in the alternative, that the defendant be afforded a new trial.

MARVIN PREMINGER

Sworn to before me this
22nd day of March, 1974

STANLEY [illegible]R
NOTARY PUBLIC [illegible] New York
No. 30-2684055
Qualified in Nassau County
Commission Expires March 30, 1975

Page #1 - Statement of [redacted]

Wednesday, August 8, 1973 - 10:15 A.M. on West 12th Street & West St. My name is [redacted]. I am [redacted] years of age and reside at the [redacted] which is the [redacted] of [redacted]. I [redacted], I was a member of the [redacted]. It may have been earlier, 1961 and then I was attached to the [redacted]. On [redacted] I will be a federal [redacted] which will [redacted]. However, I do have a total of 15 years in Government service. I have never been arrested and twice investigated and cleared by the FBI for federal employment. I am presently single and expect to be married in the fall. I [redacted]. About October of 1972, while I was working on

two floors, I became acquainted with an inmate by the name of Nicholas Christophe, they call him "Nippy" Because of a professional relationship, as ~~client~~ patient to an inmate, we began to talk to one another. One particular time, I noticed he was standing by the sink, ~~[illegible]~~ no one else was there, and he was crying. I asked him "What's the matter, are you alright?" I was wondering if he was sick or what it was that was bothering him. He seemed confused and upset. He said to watch Victor Panica, he was worried about him, that he was afraid of Panica. I know who Panica was, I used to see them together. Then he told me that he did a bad thing, that if he had testified at the trial at Panica, Panica would not be in jail today. Then, he said not to say anything to any body else, it's a secret. When I asked him why he did not take the witness stand to clear Panica, he said the U.S. Attorney had told him that if he took the witness stand to clear Panica, he, the U.S. attorney would prosecute him for Bank Robberies. That's what he said and that's why I am saying it. He insisted that the U.S. Attorney would not let him tell the truth to clear Panica. Frankly, all this

Is the above true? yes

worried me. I didn't want to have to carry all this around. I wanted to tell the truth as to what was told to me. On two separate occasions Hippy told me all this, although through October and November of 1972, he would always be talking to me. I would ask "How are you doing, Hip" and he would say "Okay, [redacted]. Are you still keeping my secret. Don't forget, don't say anything". I told him not to worry. But, all this bothered me. I want the truth to come out, but Is the above true? Yes [redacted] with all that stuff on Watergate and T.V. I'm wondering if they'll believe me even though I am telling the truth. I find it hard to believe that the U.S. Attorney would stoop to do what he's accused of but that's what Hippy told me. It's still fresh in my mind, I can't forget it.

I am making this statement freely and voluntarily. No one has threatened me, intimidated me or coerced me into making this statement. I have not been offered any compensation, nor do I expect to receive any. I would not take anything from anybody to tell the truth. I might be harassed on my job for what I am doing but I must tell the truth. As I say, I call the shot the way I see it. I have read this 2½ page statement, I understand it and it is the truth.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	:	
-v-	:	AFFIDAVIT
VICTOR PANICA,	:	72 Cr. 313
Defendant.	:	

STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF NEW YORK)

ARTHUR J. VIVIANI, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney in the office of PAUL J. CURRAN, United States Attorney for the Southern District of New York, and I am assigned to and familiar with the facts of the captioned case.

2. I make this affidavit in opposition to the defendant's motions for a new trial due to newly discovered evidence pursuant to Rule 33, Federal Rules of Criminal Procedure (FRCP), and for an order discharging him from custody pursuant to 28 U.S.C. § 2255.

Prior Proceedings

3. On March 17, 1972, Indictment 72 Cr. 313 was filed in two counts charging Victor Panica, Albert Pierro, Nicholas Christophe and Frank De Simone with possession of 39.8 pounds of heroin with intent to distribute and conspiracy so to do in violation of Title 21, United States Code, Sections 812, 841 and 846. (Indictment 72 Cr. 313 superseded Indictment 72 Cr. 138 which charged the same defendants with the same basic offenses). On March 21, 1972, all the defendants entered pleas of not guilty to Indictment 72 Cr. 313. All but De Simone were remanded to West Street in lieu of bail.

Thereafter, a request for a severance was one of the many pre-trial motions filed on behalf of the defendant Panica by his counsel, Gino Gallina, Esq.. Specifically, by notice of motion dated April 14, 1972 and filed under the superseded Indictment (72 Cr. 138), Panica and Mr. Gallina executed affidavits in support of the severance motion. Panica basically claimed in his affidavit that he "had no knowledge or connection with, the presence of narcotics or any other contraband in the vehicle seized in the case" and that he did not intend to commit the crime charged in the indictment. Mr. Gallina in his affidavit alleged the following:

"4. That the defendants FRANK DE SIMONE and NICHOLAS CHRISTOPHE must be called as witnesses to testify as an integral part of the defense of VICTOR PANICA.

"5. That I have been informed by the defendant NICHOLAS CHRISTOPHE that it is his intention not to testify at his own trial and that he has been so advised by his attorney Jeffrey C. Hoffman, Esq..

"6. That I have been further advised by Mr. Hoffman that he has no objection to NICHOLAS CHRISTOPHE testifying at a separate trial of VICTOR PANICA and have also been advised by Mr. Christophe that he is willing to testify at such a trial.

"7. That I have been informed by the defendant FRANK DE SIMONE that it is his intention not to testify at his own trial and he has been so advised by his attorney James La Rosa, Esq.. However, I have been further advised by the defendant DE SIMONE that he has no objection to testifying at a separate trial of VICTOR PANICA

"8. That I have been advised by Messrs. De Simone and Christophe that they would give exculpatory testimony concerning the defendant VICTOR PANICA, if Mr. Panica were tried separately and apart from themselves.

"9. That I have been advised Mr. De Simone would testify if tried separately and apart from Mr. Panica that he had no communication at any time with Mr. Panica concerning the events which formed the basis for the charges in this case. Further, that he at no time saw Mr. Panica at Mr. Pierro's home nor did he ever have any conversations with any of the co-defendants concerning the defendant Panica as relates to the charges in this case.

"10. That I have also been informed by Mr. Christophe that he would give exculpatory testimony concerning the defendant Panica if tried separately and apart from Mr. Panica in that he would testify that he never had any discussions with Mr. Panica concerning the events charged in this case, that

Mr. Panica was in no way connected with the contraband allegedly found in the automobile in this case, that he had never revealed to Mr. Panica the fact that any contraband was located in said automobile, and that to his knowledge Mr. Panica was completely unaware of any contraband in said automobile." (Affidavit of Gino Gallina, Esq., Sworn to on April 18, 1972).

The motion was denied on or about April 19, 1972.

On April 21, 1972, a hearing on the defendants motions to suppress evidence began before the Honorable Lee P. Gagliardi, United States District Judge, Southern District of New York. It concluded on April 25, 1972, and Judge Gagliardi ultimately denied the motion.

The following events occurred on April 26, 1972. First, Pierro changed his plea to guilty. Second, Christophe waived his right to a trial by jury and agreed to proceed to trial before Judge Gagliardi on the record of the motion to suppress. Third, a jury trial of Panica and De Simone commenced with the other two defendants being severed for the above reasons.

Mr. Panica was in no way connected with the contraband allegedly found in the automobile in this case, that he had never revealed to Mr. Panica the fact that any contraband was located in said automobile, and that to his knowledge Mr. Panica was completely unaware of any contraband in said automobile." (Affidavit of Gino Gallina, Esq., Sworn to on April 18, 1972).

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On April 28, 1972, the Court granted De Simone's motion for judgment of acquittal after the Government rested. Immediately thereafter, trial counsel for Panica, Vincent Lanna, Esq., and co-counsel, Gino Gallina, Esq., sought to have Christophe brought to Court.

Counsel for the Government informed the Court that Christophe's counsel, Jeffrey Hoffman, Esq., had advised him that if Christophe were called as a witness, he would assert his privilege not to incriminate himself. Upon that representation, the Court ruled that it would not allow Christophe to be called as a witness if he in fact intended to assert his privilege. After some colloquy, Mr. Lanna agreed to accept the word of Christophe's counsel that the privilege would be asserted thereby avoiding the delay which would result from having Christophe brought from West Street to the Court (Trial transcript, pp. 170-173).

Shortly thereafter, the following occurred:

"Mr. Higgins: With respect to Mr. Christophe, it is the Government's understanding that the defendant Panica will not be calling Mr. Christophe in its case.

The Court: The Court has been so informed and I understand that is the decision of the defendant Panica." (183)

Mr. Hoffman then confirmed his client's position. (183-184).

The defendant Panica then presented his case, and two witnesses, Edward Sableski and Daniel Capano, testified on his behalf. At no time does the record reflect that Mr. Lanna or Mr. Gallina requested the testimony of Pierro (who had entered a guilty plea) or De Simone (who had been acquitted).

On May 2, 1972, trial of Panica concluded when the jury found him guilty as charged.

On May 12, 1972, Pierro moved to withdraw his plea of guilty and decision was reserved.

On May 25, 1972, Pierro's motion was granted, both he and Christophe were tried before Judge Cagliardi and both found guilty.

On June 20, 1972, all the defendants were sentenced, and Panica received a 20 year term of imprisonment.

On February 26, 1973, the mandate of the Court of Appeals for the Second Circuit affirming the judgment of conviction was filed in the District Court.

On May 17, 1973, the order of the United States Supreme Court denying a petition for certiorari was filed in the District Court.

Present Proceedings

4. The defendant now moves for relief under Rule 33, F.R.C.P., and under 28 U.S.C. § 2255. The only evidence supporting his motions consists of hearsay, i.e., the affidavit of his apparently new attorney, Marvin Preminger, and an unsworn statement of an unidentified guard at West Street. These papers appear to allege three grounds for relief:

1. That the potential evidence which could be offered by Pierro and Christophe was not known at the time of the trial;
2. That Christophe did not testify on behalf of Panica at the trial because of the threats of further prosecutions made by Assistant United States Attorney Walter J. Higgins, Jr.; and
3. That, because "our investigation also shows that Mr. Christophe has become a federal informant...
I am led to the inescapable conclusion that Mr. Christophe was a federal informant at the time this case was tried....", thereby concluding that the "spy in the camp" doctrine had been violated.

5. The allegation that the evidence that Christophe, Pierro and even De Simone could offer as to Panica's "innocence" was "newly discovered" is absolutely and unequivocally groundless. The record of the trial and the pre-trial severance motion submitted by Mr. Gallina clearly establish that this evidence was known well before trial. Of the 3 co-defendants, the only one whom Panica sought to call was Christophe who asserted his privilege as he had every right to do. Neither De Simone (who was acquitted) nor Pierro (who had pled guilty) were called, nor did counsel request a subpoena for them despite the fact that counsel knew or should have known that both could offer exculpatory testimony.

6. The defendant's second claim, i.e. that Christophe did not testify at Panica's trial due to threats from the prosecutor, is supported only by hearsay appearing in an unsworn document of an unidentified guard. Moreover, the allegation is directly contradicted by the record of the trial, i.e., Christophe's only reason for not testifying was the fear that he would incriminate himself.

7. Lastly, the third allegation, i.e. that Christophe was an informant when the case was tried and, therefore, was a "spy in the camp", is completely unsupported by any factual allegation. Rather, it is alleged simply as a conclusion or guess of Mr. Preminger.

Wherefore, the motions should be denied without a hearing for the reasons set forth above, in the attached affidavit of Walter J. Higgins, Jr. and in the accompanying memorandum of law.

ARTHUR J. VIVIANI
Assistant United States
Attorney

Sworn to before me
this date MAY 1 1974.

JEANETTE ANN GRAYEB
Notary Public, State of New York
No. 24-1541575
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1975

AJV:lm

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	
-v-	:	AFFIDAVIT
VICTOR PANICA,	:	72 Cr. 313
Defendant.	:	

STATE OF NEW YORK	)	
COUNTY OF NEW YORK	:	ss.:
SOUTHERN DISTRICT OF NEW YORK	)	

WALTER J. HIGGINS, Jr. being duly sworn, deposes and says:

1. I am an Assistant United States Attorney in the Office of Paul J. Curran, United States Attorney for the Southern District of New York, and as such am familiar with the above-captioned case.

2. I make this affidavit in opposition to the motion of Victor Panica for an Order of this Court setting aside the judgment of conviction on the grounds of newly discovered evidence or that it was improperly obtained.

3. I was in charge of the prosecution of the defendant's case from the date of his arrest in January, 1972 through September 1972. I never threatened Nicholas Christophe that if he should testify on behalf of Victor Panica at his trial so as to exculpate Panica that he, Christophe, would be prosecuted for other offenses. To my knowledge, Nicholas Christophe was not an informant or cooperating witness from the date of his arrest in January, 1972 through the date of his sentence.

WALTER J. HIGGINS, Jr.
Assistant United States Attorney

Sworn to before me this
1st day of May 1974.

NOTARY PUBLIC

GLORIA CALABRESE
Notary Public, State of New York
No. 24-0[illegible]
Qualified in Kings County
Commission Expires March 30, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- X

UNITED STATES OF AMERICA,

-against-

VICTOR PANICA,

Defendant.

- X

REPLY AFFIDAVIT

Indictment No.
72 CR 313

STATE OF NEW YORK)
) SS.:
COUNTY OF KINGS)

MARVIN PREMINGER, being duly sworn deposes and says:

I am the attorney for the defendant herein and make this affidavit in reply to the answering affidavits of ARTHUR J. VIVIANI and WALTER J. HIGGINS, Jr., Assistant United States Attorneys.

I have read through the affidavit of MR. VIVIANI, the main one in opposition to the application for relief herein, and submit that, if anything, that affidavit supports the defendant's position rather than weakens it.

MR. VIVIANI traces the history of this case and points out that the attorney for the defendant, VICTOR PANICA, made a severance motion on the grounds that he intended to call NICHOLAS CHRISTOPHE on behalf of PANICA. Although the motion was denied, thereafter the defendant, PANICA, went to trial alone, and CHRISTOPHE's attorney advised everyone that his client would plead his privilege of self-incrimination if he was called on to testify as a witness. Thus, the Assistant United States

Attorney demonstrates in his own affidavit that PANICA wanted CHRISTOPHE as a witness, and that whether or not CHRISTOPHE was willing to testify when the severance motion was first made, there came a point during the trial where he announced he would plead his privilege (Government's affidavit, p. 6, trial transcript, p. 170-173, 183-184).

The very thrust of the entire application in this case is that that decision on the part of CHRISTOPHE not to testify on PANICA's behalf was a decision forced upon him by the Assistant United States Attorney who tried this case, and the opposing affidavit herein, which points out an apparant change of heart in MR. CHRISTOPHE, lends weight to the argument of the defendant.

We should also like to point out that the Government refers to the evidence supporting our application as mere hearsay and seeks to deprecate the affidavit of the guard annexed to the moving papers. It is such a factual affidavit of a witness, rather than the attorney alone, that this Court has always required before hearings are granted, and we suggest that the issues raised by that affidavit present very serious questions of suppression of evidence by the Government herein. It is just this sort of conduct that has been condemned by practically every Court in this country, and is just about the best grounds one can imagine for the granting of the hearing.

We did not manufacture the prison guard, and in fact no member of this firm solicited or approached him. The reason his name was deleted was to prevent any attempt to interfere with him, and as we stated in our affidavit, we will gladly make his name available to the Court. This is not merely an unsworn document of an unidentified guard, as characterized in the affidavit of the Assistant United States Attorney, but I think

it is a significant piece of evidence to show that justice was not served in this case.

In further support of the application, we have annexed hereto an affidavit of ALBERT PIERRO, one of the co-defendants, which was sent to us from the prison in Atlanta, where he is presently incarcerated. That affidavits indicates, credibility problems aside, that the deponent said that he overheard CHRISTOPHE tell PANICA that he would exonerate him on the witness stand. He also corroborates other portions of the prison guard's statement regarding activities on the part of the prosecutor.

It is curious that the Government even opposes our application. The fact is defense counsel made his intentions known in that he was going to call CHRISTOPHE as a witness, but all of a sudden, at the appropriate time, CHRISTOPHE decided that he would not testify, and thereafter an unimpeachable witness, a Federal employee, revealed that CHRISTOPHE told him his action was taken under pressure from the Government. If this is not new evidence, and evidence which warrants a hearing, I don't know what is. I also thing the Government would have a desire to get to the bottom of this just as much as the defendant.

It is respectfully submitted that this is exactly the type of case where strong and serious issues of fact are present and a hearing is certainly warranted.

MARVIN PREMINGER

Sworn to before me this
7th day of May, 1974.

STANLEY M. MEYER
NOTARY PUBLIC, State of New York
No. 30-2684055
Qualified in Nassau County
Commission Expires March 30, 1975

I, ALBERT PIERRO, after being duly sworn, deposes and says; that I am making the following statements of my own free will; that no threats, or promises, of any nature have been made to me as an inducement for me to give this sworn affidavit; that the following is motivated, and dictated, by the demands of my conscience insofar as I know that an innocent man, Victor Panica, is in prison for a crime that he did not commit.

1. That I am a co-defendant of Victor Panica and Nicholas Christopher, in Indictment No. 72 Cr 313.

2. That before my arrest, on January 27, 1972, I had never seen Victor Panica; nor was I acquainted with Nicholas Christopher prior to said date.

3. That we were locking together in the same Maximum Security cell in C-1, at the Federal Detention Headquarters, 427 West Street, New York City.

4. That in the early part of April, 1972, I overheard Nicholas Christopher, tell Victor Panica that he should not worry about being on the indictment because when the proper time arrived he (Nicholas Christopher) would take the witness stand and exonerate Victor Panica from any guilt because He, Panica, had nothing to do with this case and was merely an unfortunate innocent bystander.

5. That shortly thereafter Nicholas Christopher told me personally, outside of Panica's hearing range, that he (Christopher) would do anything Mr. Higgins, Assistant United States

Attorney for the Southern District of New York, told him to do as long as Mr. Higgins promised him that he would be allowed to visit his sick daughter.

6. That I did not make the above facts known to Victor Panica, nor did I take the stand on his behalf, because of my fear that the prosecutor's office would retaliate by framing me on a different and unrelated narcotics conspiracy case; and that the fear remains very real. However, I have since come to know Victor Panica and I have become aware of the fact that he, like myself, has a wife and family. The knowledge that his family is suffering for something that he, Panica, is innocent of is troubling my conscience and will no longer allow me to remain silent.

Accordingly, I affix my signature hereto.

Albert Pierro

Albert Pierro

Sworn to before me this
21 day of February 1974.

James K. Feagles

Parole Officer Authorized by the Act of July 7, 1955 to Administer Oaths (18 U.S.C. 4004).

V 359

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- -x

UNITED STATES OF AMERICA, :

-against- :

VICTOR PANICA, :

Defendant. :

- -x

72 Cr. 313

MEMORANDUM DECISION

#41485

GAGLIARDI, D. J.

This is a motion for a new trial, pursuant to Rule 33 Fed. R. Crim. P., and a petition for a writ of habeas corpus, pursuant to 18 U.S.C. §2255.

Defendant Panica was convicted on both counts of an indictment charging possession of heroin with intent to distribute (21 U.S.C. §§ 812, 841(a)(1), 841(b)(1)(A), and conspiracy to violate these sections. At a separate trial, two of Panica's alleged co-conspirators, Nicholas Christophe and Albert Pierro were tried together and were also convicted. The three convictions have been affirmed. United States v. Christophe, 470 F.2d 865 (2d Cir. 1972).

Panica's motions seek relief on the ground of newly discovered evidence and both are supported by two affidavits. One of these is an unsworn statement of a federal employee in the Federal House of Detention wherein Christophe was incarcerated. The employee states that he came upon Christophe

crying in his cell and asked him if anything was wrong. Christophe replied that "if he had testified at the trial of Panica, Panica would not be in jail today." And further, that "the United States Attorney had told him [Christophe] that if he took the witness stand to clear Panica, he, the United States Attorney, would prosecute him for bank robberies."

The second affidavit is from Pierro and he avers that, prior to the trials on this indictment, he overheard conversations between Panica and Christophe wherein the latter told Panica that "when the proper time arrived he would take the witness stand and exonerate Victor Panica from any guilt." Pierro also states that Christophe told him personally, "outside of Panica's hearing range that he [Christophe] would do anything Mr. Higgins [the assistant United States Attorney in charge of the case] told him so long as Mr. Higgins promised him that he would be allowed to visit his sick daughter." Pierro further states that he has remained silent on the subject until this time because he too feared repr sals from the United States Attorney's office.

In opposition to both motions the Government has submitted, inter alia, a sworn affidavit of former assistant United States Attorney Higgins categorically denying that he made any of the threats that are alleged.

Ordinarily, a hearing should be held upon a motion made pursuant to §2255 unless the motions, files and records "of the case conclusively show that a prisoner is entitled to no relief." See Fontaine v. United States, 411 U.S. 213 (1973); Dalli v. United States, 491 F.2d 758 (2d Cir. 1974); Taylor v. United States, 487 F.2d 307 (2d Cir. 1974). Clearly the affidavits submitted by Panica are not sufficient to warrant relief because they do not qualify as proper evidentiary material to support a petition under §2255, D'Ercole v. United States, 361 F.2d 211 (2d Cir. 1966). The affidavits of the federal employee and Pierro are hearsay, and would not be admissible at a hearing. In addition, the federal employee avers only that Christophe stated his belief that, had he testified, Panica would not be in jail. In this respect the affidavit is merely conclusory for, hearsay problems aside, it does not indicate the details of the testimony Christophe could have allegedly offered, but merely Christophe's conclusion as to the probable result of that testimony.

The motion for a new trial is equally lacking in support, being based upon the same affidavits.

For the reasons stated, Panica's motions are denied.

So Ordered.

U.S.D.J.

Dated: New York, New York
November 25, 1974.

United States District Court
FOR THE
SOUTHERN DISTRICT OF NEW YORK

United States of America

v.

NICHOLAS CHRISTOPHE

No. 72 Cr. 313

On this 20th day of JUNE, 1972, came the attorney for the government and the defendant appeared in person and by Jeffrey Hoffman Esq.

IT IS ADJUDGED that the defendant upon his plea of not guilty, and the Court finding the defendant guilty as charged,

has been convicted of the offense of unlawfully, wilfully and knowingly did possess with intent to distribute, a schedule I narcotic drug controlled substance to wit 39.8 pounds of heroin. (Title 21, United States Code, Sections 812, 841(a)(1) and 841 (b)(1)(A).); unlawfully, wilfully and having conspiring to possess with intent to distribute Schedule I and II narcotic drug controlled substance. (Title 21, Section 846 United States Code.

as charged,

and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of SEVEN and ONE HALF (7½) years on each of counts 1 and 2 to run concurrently with each other. Pursuant to the provisions of Section 841 of Title 21, U.S. Code, defendant is placed on Special Parole for a period of THREE (3) YEARS, to commence upon expiration of confinement.

XXXXXXXXXXXXXXXX

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

(8)

United States District Judge.

XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

United States District Court

FOR THE

SOUTHERN DISTRICT OF NEW YORK

United States of America

v.

NICHOLAS CHRISTOPHE

No. 72 Cr. 313

On this 20th day of DECEMBER, 1973 the attorney for the defendant[1] the Court grants the defendant's motion for reduction of sentence pursuant to Rule 35 of the Federal Rules of Criminal Procedure and amends its judgment of June 20, 1972 solely to the extent indicated below:

IT IS ADJUDGED that the defendant upon his plea of[2] not guilty, and the Court findin the defendant guilty as charged,

has been convicted of the offense of unlawfully, wilfully and knowingly did possess intent to distribute, a schedule I narcotic drug controlled substance t 39.8 pounds of heroin. (Title 21, United States Code, Sections 812, 841 and 841 (b)(1)(A).); unlawfully, wilfully and having conspiring to poss with intent to distribute Schedule I and II narcotic drug controlled substance. (Title 21, Section 846 United States Code.)

as charged[3]

and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted, and the judgement June 20, 1972 is amended as follows:

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of[4] four (4) years on each of counts 1 and 2 to run concurrently with each other. Pursuant to the provisions of Section 841 of Title 21, U.S. Code, defendant is placed Special Parole for a period of Three (3) Years, to commence upon expiration of confinement.

The Court recommends that the defendant shall become eligible for parole at such time as the Board of Parole may determine, pursuant to Section 4208 (a)(2) of Title 18, U.S. Code.

A M E N D E D

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to t United States Marshal or other qualified officer and that the copy serve as the commitment of t defendant.

United States District Judge

Raymond F. Burghardt

FOR THE

SOUTHERN DISTRICT OF NEW YORK

United States of America

v.

VICTOR PANICA

No. 72 Cr. 313

On this 20th day of JUNE, 1972 came the attorney for the government and the defendant appeared in person and by Jay Goldberg, Esq.

IT IS ADJUDGED that the defendant upon his plea of not guilty, and a verdict of guilty has been convicted of the offense of unlawfully, wilfully and knowingly did possess with intent to distribute, a Schedule I narcotic drug controlled substance to wit 39.8 pounds of heroin. (Title 21, United States Code, Sections 812, 841 (a)(1) and 841 (b)(1)(A).); unlawfully, wilfully and having conspiring to possess with intent to distribute Schedule I and II narcotic drug controlled substances. (Title 21, Section 846 United States Code.

AND

the defendant Victor Panica, duly represented by counsel, admits that he is the person previously convicted as charged on one separate Federal Narcotic Violation.

as charged

and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TWENTY (20) YEARS on each of counts 1 and 2 to run concurrently with each other.

Pursuant to the provisions of Section 841 of Title 21, U.S. Code, defendant is placed on Special Parole for a period of SIX (6) YEARS, to commence upon expiration of confinement.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

~~The Court recommends commitment to~~

(6)

United States District Judge.

John Lewis Livingstone
Clerk.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- X

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

VICTOR PANICA,

Defendant-Appellant.

- X

Indictment No. 72 CR 313

NOTICE OF APPEAL

Name and Address of Appellant:

VICTOR PANICA
Federal Penitentiary
Atlanta, Georgia

Name and Address of Attorneys for Appellant:

PREMINGER, MEYER & LIGHT
66 Court Street
Brooklyn, New York 11201

Offense: Conspiracy to Distribute Narcotic Drugs and Possession of Narcotic Drugs, in violation of 21 U.S.C., Sections 812, 841(a)(1) and 841(b)(1)(A)

Appellant appeals from the judgment of conviction, convicting him of the above charges rendered June 14, 1972, (Gagliardi, J.), and sentencing him to concurrent terms of twenty years in prison on each count.

Appellant is presently confined at the Federal Penitentiary in Atlanta, Georgia.

Appellant hereby appeals to the United States Court of Appeals for the Second Circuit from the whole and each and every part of the above stated judgment.

Dated: Brooklyn, New York
January 14, 1975

Yours, etc.,

PREMINGER, MEYER & LIGHT
Attorneys for Appellant
66 Court Street
Brooklyn, New York 11201

TO: Clerk of the United States District Court
Southern District of New York
United States Courthouse
Foley Square
New York, New York 10007

HON. PAUL J. CURRAN
United States Attorney
Southern District of New York
United States Courthouse
Foley Square
New York, New York 10007